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IN THE

Supreme Court of the United States

October Term, 1961

No. 7

JOHN JOSEPH KILLIAN,
Petitioner,

vs.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

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Petitioner, John Joseph Killian, respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying in part the petition for writ of certiorari, reported at 365 U. S. 810. Rehearing is sought at this time because, as is more fully pointed out in the annexed petition, the decision of this Court in this case on December 11, 1952, adds new importance to the questions presented, particularly in view of the possibility of a retrial.

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Petitioner John Joseph Killian prays that this Court grant rehearing of its order reported at 365 U. S. 810 denying in part the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled cause.

Statement of Events Warranting Rehearing

The opinion of this Court, handed down December 11, 1961 held that the trial court had properly defined membership and affiliation as subjective relationships since they were such "to all but the organization and its member or members." The Court held, since the government had confessed error, that a District Court hearing should be held on the question of whether petitioner's rights had been prejudiced by the failure of the prosecution to produce certain statements. The majority opinion further discussed the proper definition of the term "affiliated with." It is respectfully submitted that the majority opinion and decision of this Court warrant rehearing of the denial of the writ of ceriorari.

Questions Presented

The decision of this Court requires us to rephrase questions "4" and "7," as presented in our Petition for a writ of certiorari, to read as follows:

1. In a prosecution under Title 18, U. S. C. A. § 1001 defendant was charged with "knowingly" and "willfully" filing a Taft-Hartley non-Communist affidavit which was allegedly false in its denials that defendant was a member of the Communist Party or affiliated with that Party. The later decision of this Court held that while these terms define a subjective relationship only, there was a legitimately alternative possible meaning of the term "member" as defining a relationship having both objective and subjective components.

a. Should the trial judge have instructed the jury that it could not convict if it found that defendant, in taking the oath, believed in good faith that he was not a member of or affiliated with the Communist Party?

b. Was it error for the trial judge to instruct the jury that to act "knowingly" merely means "to act voluntarily and purposely and not because a mistake or inadvertence or other innocent reason?"

c. Was it error for the trial judge to instruct the jury that a person is held to intend the natural and probably consequences of acts "knowingly" done?

2. Where the defendant's good-faith understanding of the meaning of membership in and affiliation with the Communist Party is put in issue in a prosecution for filing a false non-Communist affidavit, and prosecution witnesses have testified concerning the structure and nature of the Communist Party, should the production of those witnesses' "statements" under Title 18 U. S. C. A. § 3500 be restricted,

merely because those statements did not specifically mention the defendant, although they might cast light upon the actual meaning of membership and affiliation within the area of defendant's knowledge, and upon defendant's understanding of those concepts?

The opinion of the majority of the justices raises the following question which was not previously presented.

3. Where the indictment charges in separate counts that defendant simultaneously made false statements that he was not a "member" of or "affiliated with" the Communist Party (statuses which are by definition mutually incompatible), should the trial judge upon proper request have instructed the jury that defendant could not be found guilty on both counts?

The remainder of the questions upon which certiorari was previously denied are as follows:

4. Whether the evidence in this case was sufficient to support a judgment of conviction of violation of 18 U. S. C. §1001 by filing a false affidavit of non-Communist Union Officer with the National Labor Relations Board's Regional Office, Chicago, Illinois, when:

a. The record is silent as to any acts of Communist Party membership or affiliation by petitioner for some thirteen months prior to the filing and some three months thereafter?

b. The sole evidence of petitioner's Communist Party membership or affiliation is the testimony of a single uncorroborated witness?

c. The only evidence that petitioner knew that the affidavit was to be submitted to a government agency and that he signed it for the purpose of using the facilities of the National Labor Relations Board, is the mere fact that petitioner signed the affidavit?

d. There is no evidence that the petitioner's union made any use of, or attempted to use the machinery of the National Labor Relations Board while petitioner was an officer of the union?

e. There is no evidence that activities of the petitioner, his union or his employer affect interstate commerce or that the union represented "employees" as defined by the National Labor Relations Act?

f. The evidence did not show that the National Labor Relations Board first received the affidavit in the Eastern District of Illinois?

5. Whether 29 U. S. C. § 159(h), and 18 U. S. C. § 1001 as here applied are a Bill of Attainder and violate petitioner's rights under the First Amendment to freedom of speech and assembly?

6. Whether the court erred in refusing to give cautionary instructions on the testimony of paid informers?

7. Whether the trial court erred in permitting the prosecution to introduce irrelevant, prejudicial and highly inflammatory evidence on the program, activities and policies of the Communist Party and its members at times when, and places where, petitioner's membership in the Communist Party was not at issue in the case?

8. Whether the trial court erred in permitting the prosecutor to argue to the jury from the failure of the defense to use the statements of witnesses produced under 18 U. S. Code § 3500, when the statements were not in evidence?

9. Whether the trial court erred in permitting the prosecutor to give unsworn testimony in his summation?

Reasons for Granting the Writ

1. The opinion of this Court for the first time definitively establishes a subjective definition of the term "member" as applied to membership in the Communist Party. At the same time the opinion concedes that this subjective definition may not be the true one as known to "the organization and its member or members," i.e., that to the organization and its members, membership may be an objectively definable relationship having certain objectively definable qualities. The record in this proceeding demonstrates that membership in the Communist Party is an objective relationship with a subjective element. The testimony of the government's own witnesses, Fensholt, Sullivan and Ondrejka shows that, as members of the Communist Party, they were members of an organization with externalized objective qualifications for membership: payment of dues, attendance at formalized meetings, where decisions are taken by vote after discussion, assignment to subordinate units, formalized transfer between branches and areas etc. (See Brief for the United States, pp. 4-6, 8-10.)

Under the statute as interpreted by this Court there were thus two interpretations of the oath which were available to petitioner. If he were cognizant of the objective meaning of membership as known to the smaller group then the oath as to membership would have meant foreswearing that kind of membership. If he had in mind the subjective relationship between the Communist Party and the individual which the opinion of this Court establishes as the proper definition under the statute, his oath would have foresworn *that* relationship to the Communist Party. These two possibilities existing, it was error for the trial court to charge as it did that the requirement that the false statement be made "knowingly" meant merely that it was not made accidentally and that the natural consequences of an act knowingly done were presumed to be intended.[1] Since there were two available

1. The instructions in question were set forth in the Appendix to our previous petition for a writ of certiorari.

interpretations of the oath the trial court should have instructed the jury that, as a condition of guilt, it was required to find, independently of its other findings, that petitioner had a subjective relationship in mind (as defined by this Court) when he foreswore membership in and affiliation to the Communist Party, and did not have in mind the objective-subjective relationship.

This conclusion is verified by the opinion of Chief Justice Vinson in *American Communications Association* v. *Douds*, 339 U. S. 382, 410-411. The Chief Justice said:

> "The only criminal punishment specified is the application of § 35(A) of the Criminal Code, 18 U. S. C. § 1001, which covers only those false statements made 'knowingly and willfully.' The question in any criminal prosecution involving a non-Communist affidavit must therefore be whether the affiant acted in good faith or knowingly lied concerning his affiliations, beliefs, support of organizations, etc. . . . Without considering, therefore, whether in other circumstances the words used in § 9(h) would render a statute unconstitutionally vague and indefinite, we think that the fact that under § 35(A) of the Criminal Code no honest, untainted interpretation of those words is punishable removes the possibility of Constitutional infirmity."

The Court's opinion in the instant case, establishing two possible definitions of membership, permits of the possibility that petitioner's "honest, untainted interpretation" of the oath was that in taking it he foreswore only the objective relationship of membership, and not the subjective relationship defined by this Court. If this was the case, petitioner was innocent. The trial judge foreclosed jury consideration of this possibility of petitioner's innocence by his instruction that to act "knowingly" means merely to act non-accidentally and that a person is assumed to intend the consequence of acts "knowingly done."

Chief Justice Vinson's interpretation of the word "knowingly" is in accord with authoritative expression of professional opinion. The American Law Institute in its Model Penal Code (Tentative Draft No. 4), Section 202(b) defines "knowingly" as follows:

> "(b) Knowingly.
>
> A person acts knowingly with respect to a material element of an offense when:
>
> (1) if the element involves the nature of his conduct or the attendant circumstances, he knows that his conduct if of that nature or he knows of the existence of such circumstances; and
>
> (2) if the element involves a result of his conduct he knows that his conduct will necessarily cause such result."

Professor Perkins, Perkins: *A Rationale of Mens Rea*, 52 Harvard L. Rev. 905, stated in classifying the various sorts of *mens rea*,

> "Only in the most theoretical discussions would it even be questioned that one has knowledge of facts of which he has been made aware by his own observation. Nor would it be suggested that one has knowledge of facts when he has a bona fide belief to the contrary, based upon reasonable grounds. Such a person will be treated as if the facts were as they reasonably appeared to him unless the particular 'offense' does not require *mens rea* for conviction, or the deed, even under the circumstances as they were reasonably supposed to be, would have involved such a degree of social fault that the doer may properly be held to have acted at his peril in this regard" (p. 919).

* * *

> "In the latter—bona fide belief contrary to fact, not based on reasonable grounds—there is no fault in the belief itself, but only in the mental processes which have induced the belief. Conviction of some offenses is possible, although the fault does not exceed the boundaries of this category. But where a belief contrary to fact is entertained in good faith, no amount of negligence in its acquisition will meet the requirement if 'knowledge' is essential to guilt" (p. 920).

In *Murdock* v. *United States*, 290 U. S. 389, this Court held that a defendant upon a charge of willful evasion of his tax obligation was entitled to have the jury instructed that he could not be convicted if he acted with good faith and upon his actual belief as to his rights and duties.

In *Morissette* v. *United States*, 342 U. S. 246, the Court pointed out the fundamental nature of the requirement that knowledge and intent be actual rather than constructive,

> "The contention that an injury can amount to a crime only when inflicted by intention, is no provincial or transient notion. It is an universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability of the normal individual to choose between good and evil" (p. 250).

The Court held that where *mens rea* was an element of the crime charged an instruction such as was given here was error

> "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. . . . It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act" (p. 274).

See also *Screws* v. *United States*, 325 U. S. 91; *Spies* v. *United States*, 317 U. S. 492, 497-500; *Heikkinen* v. *United States*,

355 U. S. 273, 279-280; *Scull* v. *Virginia*, 359 U. S. 344; Mueller: *On Common Law Mens Rea;* 42 Minnesota L. Rev. 1043.

In this case the trial court not only failed to give the proper instruction, it withdrew the issue from the jury "by instruction that the law raises a presumption of intent from an act." *Cf. Morrisette* v. *United States, supra.*

The issue raised by the trial judge's error assumes importance in this proceeding because of the possibility of retrial where the wrong to petitioner will be perpetuated. It assumes especial importance in the light of this Court's acceptance of the subjective definition of Communist Party membership rather than an objective one. To the extent that the decision lessens the protection afforded the individual (and we submit that protection is greatly less than that which was thought to exist under the previous understanding of the law) it becomes important that the strength of the remaining protection to individual rights be established.

The problem of what is knowing membership in the Communist Party and what instructions should be given with regard thereto will almost certainly rise in the trial courts within a short time with reference to Ti. 29 U. S. C. § 504 (forbidding members or former members of the Communist Party to be union officers or employees) or Ti. 50 U. S. C. § 794 (requiring registration by Communist Party members) or both. Guidance should be given by this Court before the error of the court below be multiplied in those prosecutions.

Moreover, the ruling of the Court of Appeals below upholding the trial court's instruction conflicts with the ruling in other prosecutions under § 1001, *Freidus* v. *United States* (D. C. Cir., 1955), 223 F. 2d 598, *Jencks* v. *United States* (5 Cir., 1955), 226 F. 2d 540. The volume of prosecution under Ti. 18 U. S. C. § 1001 urges that this conflict be resolved.

2. The rulings of this Court directing a hearing on whether the statements improperly withheld at trial related

to the direct testimony of the witnesses raises the important question of the limits of the statutory term "relates to" as it appears in Title 18 U. S. C. A. § 3500(b). The trial judge ruled that only those statements of government witnesses where defendant was mentioned by name should be produced. (tr. 240-244) It is respectfully submitted that if this ruling stand petitioner's rights will be seriously prejudiced at the hearing, and that they were likewise seriously prejudiced at his trial.

As we have noted *supra*, the opinion of this Court recognizes that interpretations of the terms "member" and "affiliated with" other than the one adopted by the majority is legitimately possible. If petitioner had those alternatives in mind when he took the oath, and honestly believed himself not to be a member of affiliated with the Communist Party, he should be found innocent. The issue of what petitioner knew or believed and had reason to know or believe the nature of membership in the Communist Party actually to be, thus becomes material. The record shows that petitioner's knowledge of the nature of membership in and affiliation to the Communist Party was derived from the practice of the Communist Party in Madison, Wisconsin (the University of Wisconsin), and Milwaukee, Wisconsin, subjects of the direct testimony of the prosecution witnesses. Their "statements" illustrating that practice would have cast light on petitioner's state of mind when taking the oath even though the reports did not mention him by name.

We emphasize that the questions before the trial is not whether the statements could or would have been used at the trial (that can not be known until the documents are produced). The question is whether under this Court's decision in *Campbell* v. *United States*, 365 U. S. 85, the trial judge should have ordered production of the documents before him for his own *in camera* examination. In *Campbell* the majority opinion of this Court held that a trial judge had a duty,

> "affirmatively to administer the statute in such a way as can best secure relevant and available evidence necessary to decide between the directly opposed interest protected by the statute—the interest of the government in safeguarding government papers from disclosure, the interest of the accused in having the government produce 'statements' which the statute requires to be produced" (p. 95).

The minority opinion in *Campbell* likewise pointed out that the statements must be produced unless they are "patently not producible under the Act" (365 U. S. at p. 108).

The witnesses' statements were not "patently not producible." We submit that under this Court's opinion in *Killian* the reverse is true. Unless the error below be corrected by this Court it will be perpetuated at the new hearing.

3. The opinion of this Court holds proper the definition of the term "affiliated with" as being "short of and less than membership." By this definition a person could not be both a member of the Communist Party and affiliated with the Party at one and the same time. The trial court therefore should have given the instruction which defendant requested (tr. 605), that a guilty verdict could not be returned on both counts of the indictment. It was especially important that the trial court do so in this case, because of its concededly erroneous definition of affiliation and the potential of confusion of issues inherent therein.

That the trial court's failure so to instruct led to confusion in the jury's deliberations is shown by the contradictory verdict of guilty on both counts. It found defendant to be affiliated with the Communist Party (and hence not a member); at the same time it found him to be a member (and hence not affiliated). Instructions which lead a jury of qualified jurors to such a ridiculous conclusion are so confusing as to require reversal.

4. In our petition for writ of certiorari we have set forth at the reasons why review should be had of the remaining questions. The Court is respectfully referred thereto.

CONCLUSION

For the reasons set forth herein and in the petition for a writ of certiorari, rehearing of the partial denial of the writ of certiorari should be had and the writ granted as prayed for here.

Respectfully submitted,

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Certificate

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

/s/ BASIL R. POLLITT
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